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Supreme Court of the United States

OCTOBER TERM, 1903.

No. 240.

THE DELAWARE INDIANS RESIDING IN THE CHEROKEE NATION AS A TRIBE AND INDIVIDUALLY, COMPLAINANTS, *Appellants,*

against

THE CHEROKEE NATION, RESPONDENT.

BRIEF FOR RESPONDENTS.

WILLIAM T. HUTCHINGS,
JOHN J. HEMPHILL,
Atty's for Respondents.

Supreme Court of the United States

OCTOBER TERM, 1903.

DELAWARE INDIANS,
vs.
CHEROKEE NATION.
No. 240.

STATEMENT.

After several years of more or less desultory effort, a treaty was finally executed April 8, 1867, between the Cherokee Nation and certain Delawares numbering 985, residing in Kansas, by which the latter agreed to pay $1.00 per acre for 157,600 acres of land belonging to the Cherokee Nation, and a certain sum in cash, the amount of which was to bear the same proportion to the funds of the Cherokee Nation held in trust by the United States that the number of said Delawares bore to the whole number of Cherokees. This was ascertained to be $121,824.28, and this, together with the $157,600 for the land, was transferred by the United States Government from the trust funds of the Delawares to the trust funds of the Cherokees, and the former, numbering 985, and known as the "Registered Delawares," removed in 1867 from the State of Kansas to the Country of the Cherokees in the Indian Territory, and have ever since resided there.

By an act approved June 28, 1898, (*30th Statutes, 495*) Congress empowered this Court, upon suit being brought,

to adjudicate and fully determine what right and interest these Delawares residing in the Cherokee Nation acquired in the lands and funds of said Nation under their contract and agreement with the Cherokee Nation, dated April 8, 1867.

This suit was commenced by the said Delaware Indians, within the time limited by said Act of Congress, to have their rights fixed and determined by the Court under said treaty of April 8, 1867.

The Court of Claims dismissed the petition and the petitioners appealed to this Court.

ARGUMENT.

The principal question to be adjudicated is that relating to the character and extent of the title acquired by the Delawares in the 157,600 acres of land purchased at the price of $1.00 per acre from the Cherokee Nation; being a part of the National Domain of the Cherokees.

The right of the Delawares to this land comes solely from the terms of the treaty made by them with the Cherokees in 1867, and the jurisdiction of this Court in this case is limited to the determination of the rights of the Delawares "under their contract and agreement with the Cherokee Nation, dated April 8, 1867".

The attempt to bring into the case any other treaties or agreements is only an effort to carry the Court outside of the authority conferred by Congress and to try to secure a judgment based upon something other than the agreement made by the parties in interest.

Looking to the terms of the agreement we submit that it is perfectly plain that what the Delawares acquired was the right for each "registered Delaware" to occupy, improve and use a certain quantity of the National Domain

of the Cherokee Nation, the aggregate extent of which was to be ascertained and measured by multiplying the number of registered Delawares by 160, thus fixing the total quantity of land at 157,600 acres. These lands, being 160 acres for each person, were to be occupied and used by the registered Delawares during the life of the respective occupants, and at the death of any registered Delaware the land so occupied and used by him, being during all this time a part of the National Domain of the Cherokees, would simply continue such, freed and released, however, from the life estate of the registered Delaware, the former occupant. Coupled with this life estate of the said registered Delawares was the further provision, that in any future allotment of the lands of the Cherokee Nation the registered Delawares should have at least 160 acres each, including their improvements. Children of Delawares born after the removal to the Cherokee Nation acquired no special rights of any kind in the land. They simply became citizens of the Cherokee Nation with the rights of native Cherokees, and none other.

It is important to note that the Delawares had no power or authority in themselves to take possession of or use the lands of the Cherokee Nation. They could only do so under and by virtue of the authority of the United States after agreement with the Cherokees, and the sole right and power of the United States to locate the Delawares or any other Indians on the domain of the Cherokee Nation is claimed to be derived from the Fifteenth Article of the treaty of July 19, 1866, between the United States and the Cherokees.

By this treaty the United States is limited to the right to "settle" friendly Indians in the Cherokee country, and the Indians so settling, if they preserve their tribal organization, are restricted to the right to have "a district of country set

off for their use." If they abandon their tribal relations they are at once incorporated into the Cherokee Nation on equal terms in every respect with native citizens.

Clearly there is no authority in this, the original source of power, to grant or for the Delawares to take a *fee simple title* to land such as they claimed in their argument in the Court below nor such title as in their revised and altered opinions they are claiming before this Court.

Examining the agreement between the Delawares and the Cherokees of April 8, 1867, under which title to the 157,600 acres is now claimed by the Delawares, we find :

1. That the preamble refers to the treaty between the United States and Cherokees by which friendly Indians might be "settled" on Cherokee lands.

2. It cites the refusal of the Cherokees to make *cession* of a part of their lands to the United States to *sell* to the Delawares, and that instead thereof terms had been provided by which friendly Indians might be "settled" on Cherokee lands, and that a full and free conference had been held looking to a "location" of the Delawares upon "Cherokee lands".

3. It then says the Cherokees agree to sell to the Delawares, for their "occupancy" a quantity of land specified.

4. It provides specifically that in case the Cherokee lands shall hereafter be alloted 160 acres shall be granted to each Registered Delaware, including his improvements.

Surely no such provisions as this last would have been necessary or proper in this treaty if the 160 acres occupied by each Delaware had been already conveyed to him by a fee-simple title, or other such title as to take it out from the body of the Cherokee lands subject to allotment. It was only the "Cherokee lands" that were to be allotted, and if

these 160-acre tracts had been conveyed away by indefeasible title they were no longer part of the National Domain; were not subject to allotment, and should not have been considered or embraced in any provision looking to allotment of Cherokee lands.

5. In the *habendum clause* the treaty provides for the continued ownership and occupancy of the land, but expressly limits this to the registered Delawares, and omits entirely all reference to their heirs and assigns which are wards absolutely necessary at common law to a title in fee-simple; and further provides that such ownership and occupancy shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon the citizens thereof. No one pretends that the ownership and occupancy of land in the Nation by a Native Cherokee carries a title in fee, or that it exceeds in extent the right simply to enclose, improve and use the lands, and to own and dispose of the improvements at will. But lest there should be some such claim of title to these lands set up as is being done in this case, and to set the matter entirely at rest, the Commissioners added to the agreement this *proviso*: "That nothing herein shall confer the right to alienate, convey or dispose of any such lands except in accordance with the constitution and laws of said Cherokee Nation." One of the essential features of a title in fee simple is the right and power to convey a similar title to any purchaser. But no one will pretend that under the Constitution and laws of the Cherokee Nation any provision is made, or authority given, for the holder of any land within the Cherokee Nation to convey to any one, whether a Cherokee or not, a title in fee to the land he occupies.

6. The agreement does not provide that the identical lands that were originally selected by the individual Dela-

wares shall be guaranteed to each Delaware, but only that the "aggregate amount of land herein provided for the Delawares, to include their improvements, according to the legal subdivision, when surveys are made (that is to say, 160 acres for each individual), shall be guaranteed each Delaware incorporated by these articles into the Cherokee Nation."

7. In guarding against interference with the ownership and occupancy of these lands the treaty expressly confines this protection to the "Delaware so registered." A most remarkable oversight and omission if it was intended by this treaty to convey such an estate in these lands as the petitioners set up here. If the descendants of these registered Delawares were to enjoy these lands in the same manner as their fathers, they would certainly have been provided for in this important clause of the treaty.

The construction the petitioners contend for completely sets at naught the plain language of the last paragraph of the Delawares–Cherokee Agreement, which provides that the children of these registered Delawares "shall, in all respects, be regarded as native Cherokees." Native Cherokees have no such estate in the public domain of the Nation as empowers them to reserve 160 acres each from allotment.

8. It is insisted by the petitioners that the Delawares bought all the title the Cherokees had to these lands.

As matter of fact, they bought whatever title is conveyed by the agreement of April 8, 1867, and nothing more, and while the character and extent of their rights cannot be greater than the title held by the Cherokees, the grantors, it is not necessarily the entire estate the Cherokees possessed in the lands, but only so much as the language of the treaty conveys.

The petitioners insist that the Delawares have preserved

their tribal existence, and that these lands were purchased and conveyed to the Delawares as a tribe, hoping thereby to furnish some basis, however shadowy, for the contention that the title which the Cherokees held as a tribe was transferred to the Delawares as a tribe.

The agreement between the Delawares and Cherokees shows that it was not intended that these Delawares should be received or be regarded by either party as a tribe.

They have not sustained a tribal government since their removal. They have a business committee to look after the trust funds held by the United States Government but they have and have not had any Chiefs or Council; they make no laws and have no courts, but on the contrary have always participated in the election of the Cherokee Chiefs and Council; have frequently held numerous offices in the Cherokee Nation; helped to make and are governed by Cherokee laws, and in every other way have conducted themselves as Native Cherokees.

The preamble to the Cherokee–Delaware agreement states as one of its objects the *consolidation* of the Delawares with the Cherokee Nation (Record, p. 2).

The body of the agreement provides that on the fulfilment by the Delawares of the stipulations therein provided all the members of the tribe registered as therein specified "shall become members of the Cherokee Nation."

No man can serve two masters; neither can a Delaware be a member of two nations.

Further the agreement contains a clause to this effect "nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with in any manner whatever without *his* consent." Not the consent of the tribe, showing thereby that the right or title to this land, whatever it is, went to the occupant as an individual member of the Cherokee tribe, who was to hold it

under " the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon native citizens thereof."

It thus appearing that the Delaware tribe was disbanded so far as these registered Delawares composed it; that they as individuals were consolidated with and became members of the Cherokee Nation, and that the ownership and occupancy of the lands purchased was lodged in the individual Delawares, and not in a tribe, and that they each held under the same conditions and restrictions as native Cherokees owned and occupied their holdings of land, it becomes plainly manifest that these 157,600 acres are to be allotted to the members of the Cherokee Nation in the same way as all the other public domain of the Nation, subject only to the condition that the improvements owned by any registered Delaware are to be included in any allotment to him and that he is to have at least 160 acres. In every other respect the Delawares and the 157,600 acres of land are to be treated and handled as all the other citizens and lands of the Cherokee Nation.

The petitioners endeavor to separate the agreement of April 8, 1867, into two entirely separate and distinct contracts; one for the purchase of land and the other for the acquisition of citizenship in the Cherokee Nation.

This cannot be done without wholly disregarding the purpose of the agreement and altering its terms.

It is all embraced in one paper and was prepared and executed at the same time and by the same parties after a full and free conference. Its declared purpose is to locate the Delawares on Cherokee lands and consolidate them with the Cherokee Nation. It was not intended to sell lands which should become the indefeasible property of another tribe of Indians to reside permanently in the midst of the Cherokees and then to grant these same persons, for a

consideration, the rights of citizens in the Cherokee Nation in addition to rights in the Delaware tribe.

The terms of the agreement provide for the sale of the land "for and in consideration of certain payments and the fulfillment of certain conditions hereinafter mentioned." There was certainly but one payment for the land. If then the purchase of the land was entirely separate from the citizenship rights why is reference made to "*payments* and *conditions*" (Rec., p. 4)?

Again near the close of the agreement it is set out that "on the fulfillment by the Delawares of the foregoing stipulations" they are to become members of the Cherokee Nation. The stipulations referred to mean those relating to the land and to citizenship, so that the two things are bound closely together and constitute one agreement.

We think, therefore, that the express terms of the Agreement between the Delawares and the Cherokee Nation, under which the former moved into the Cherokee country, and now occupy a portion of its lands, expressly limits the right of the Delawares in the 160 acre lots to the occupancy and use by the Registered Delawares who selected and occupied them with the same conditions and limitations that attach to the occupancy and holding of land by a Native Cherokee.

If the terms of the Agreement were not so plain the conclusion is unavoidable that the right of the Delawares in the 157,600 acres was limited to the life of the Registered Delawares and to the same kind of occupancy that native Cherokees enjoyed, for the reason that the Cherokees themselves did not possess a title in fee simple, and consequently could not convey such a title to the Delawares.

In addition to the plain terms of the Agreement it has been decided by the Supreme Court of the United States what character of title the Delawares took.

"The individual Delawares took their homes in, and remaining in the Cherokee reservation, and as lands to be considered in any subsequent allotment in severalty among the members of the Cherokee Nation."

"Neither should too much weight be given to the fact that the Delawares were to pay for their homes at the rate of a dollar per acre, for by purchase they acquired no title in fee simple."

"So long as each individual Indian, whether Delaware or Cherokee, had his particular tract as *occupancy* for a home," it was not unnatural or unequal that the vast body of the lands not specifically appropriated should be treated as the common property of the Nation, to which all members, whether by birth or adoption, should be entitled to equal rights and privileges.

Journeycake *vs.* U. S., 155 U. S., 213, 214, 215.

The fee of lands in the Cherokee Nation is in the Nation.

Whatever right any citizen has to occupy any particular parcel of the public lands of the Nation, he must acquire under and in pursuance of the laws of the Nation, and not in defiance of them. Bell *vs.* R. R. Co., 63 Fed. Rep., 417–420.

It will hardly be contended that the Cherokee Nation conveyed to the Delaware Indians in the Cherokee Nation a greater or better title than the Cherokees themselves possessed. In fact, the testimony shows that from beginning of the negotiations to the end, the Cherokees were entirely averse to conveying to the Delawares a separate and distinct portion of the National Domain, and it does not stand to reason that they did really intend to convey rights or title to the lands which they themselves did not enjoy. The petitioners argue that the United States, having approved the agree-

ment between these two tribes of Indians, thereby conveyed its title in these lands to the Delawares. It is an extraordinary proposition to say that a third party who approves of an agreement between two others, thereby surrenders his title to thousands of acres of property without the use of the ordinary terms by which landed property is conveyed in this country.

In addition to that, the President of the United States has no power to convey away the public lands of the United States, or any other property of the Government except by express authority of an Act of Congress. No such act authorizing conveyance of the title of the United States in the Cherokee lands has been cited. The public lands of the United States are transferred by patent from the General Land Office at Washington, and if any other conveyance is relied upon, the Act of Congress must be shown.

The petitioners have undertaken by oral testimony to shade off the force and meaning of the words used in the treaty and to substitute therefor the alleged understanding of one of the parties to the agreement of April 8, 1867, so as to take by that agreement a fee-simple title to the land in dispute.

They examined seventeen witnesses out of 985 Delawares and 13,000 Cherokees. Only ten of these undertake to testify as to the construction of the agreement contended for by the Delawares, and they give hearsay evidence by undertaking to relate conversations they had heard other Delaware Indians have thirty-five years ago. The petitioners in another part of the argument, refer to the illiterate condition of the Delawares and their commissioners who signed the agreement, but seem to forget that they are thus materially weakening their own testimony; for if their leading men were not able to comprehend the meaning of a paper so clear and plain as this, it must be apparent that the less impor-

tant members of the tribe are wholly incompetent to guide this Court in the construction of this agreement by detailing conversations that occurred more than a generation ago. The Court is certainly entitled to evidence of a better character than this before it can be expected to convert a life occupancy of land as set out in the solemn compact of the parties, into a fee-simple title after the lapse of thirty-five years.

These conversations relate solely to the understanding of the Delawares, and even if accurate, cannot bind the Cherokee or settle their rights. The agreement was discussed thoroughly and frequently while in process of preparation in the presence of the Commissioner of Indian Affairs, was executed in Washington in open day, and was not the outcome of an over-reaching contract by the Cherokees in some distant place where the Delawares were without counsel. One witness only—S. H. Benge—undertakes to testify as to the views or understanding of the Cherokees, he only gives his individual opinion, and he finally voted for the ratification of the agreement by the Cheroke Senate. The views of the other 13,000 Cherokees was, we may assume, in exact accord with the terms of the agreement as no proof is offered to the contrary.

All of the foregoing testimony however was objected to by the respondent on the ground that it was incompetent to vary the terms of the written agreement.

Complainants have realized the importance of varying the terms of this agreement or at least of putting upon it a construction that its plain terms will not admit of, for without such variation they could not possibly have any standing in this Court.

A similiar instance came before the Supreme Court of the United States in case of the Eastern Band of Cherokee Indians *vs.* The United States, 117 U. S., 288.

In fact the character of testimony sought to be introduced to change the treaty was exactly the same as in this case and the Supreme Court in passing upon this class of evidence makes this statement:

> "While the Treaty of 1846 was under negotiation, one William H. Thomas appeared in Washington as representative of Cherokees in North Carolina and urged a recognition of their demands for the per capita money and the removal and subsistence money under articles 8 and 12 of the Treaty of 1835. He had obtained a statement from one of the commissioners who negotiated that treaty on the part of the United States, from several respectable persons who were privy to the negotiations, and from some of the Cherokees who signed the treaty, as to the meaning which should be given to certain terms used in it; and we are referred to these documents as though they should have some influence upon the construction of those terms. But it is too plain for controversy that they cannot be used to control the language of the Treaty or guide in its construction."

Of course as a general proposition there must be some ambiguity or some obscurity about the language of any instrument to warrant the introduction of such testimony as is here sought to be adduced, and if there is no such in this case the introduction of it could not be warranted from any state of facts.

This Treaty has been before this Court and the Supreme Court of the United States before and the jurisdictional acts referring the matter to the court now and then are very much the same and quite as full in each case, as will be seen by the following extracts from the acts.

JURISDICTIONAL ACT.

> "An act to refer to the court of claims certain claims of the Shawnee and Delaware Indians, and the freedmen of the Cherokee Nation, and for other purposes.

Be it enacted, etc.—That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States as in other cases, to hear and determine what are the *just rights* in law, or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude, under the provisions of article fifteen of the Treaty of July nineteenth, eighteen hundred and sixty-six make by and between the United States and the Cherokee Nation and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians June seventh, eighteen hundred and sixty-nine, approved by the President June ninth, eighteen hundred and sixty-nine, and articles of agreement made with the Delaware Indians, April eighth, eighteen hundred and sixty-seven; and also of the Cherokee Freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six in respect to the subject-matter herein provided for."

See Act set out in full in Journeycake *vs.* Cherokee Nation, 28 Ct. Claims, 282.

Section 25 of the Curtis Act, 30th United States Statutes at Large, p. 495, authorizing this suit, is as follows:

"That before any allotment shall be made of lands in the Cherokee Nation, there shall be segregated therefrom by the commission heretofore mentioned, in separate allotments or otherwise, the one hundred and fifty-seven thousand, six hundred acres purchased by the Delaware Tribe of Indians from the Cherokee Nation, under agreement of April eighth, eighteen hundred and sixty-seven, subject to the judicial determination of the rights of said descendants and the Cherokee Nation under said agreement. That the Delaware Indians residing in the Cherokee Nation are hereby authorized and empowered to bring suit in the Court of Claims of the United States, within sixty

> days after the passage of this act against the Cherokee Nation, for the purpose of determining *the rights* of said Delaware Indians in and to the lands and funds of said Nation under their contract and agreement with the Creek Nation dated April eighth, eighteen hundred and sixty-seven; or the Cherokee Nation may bring a like suit against said Delaware Indians; and jurisdiction is conferred on said court to adjudicate and fully determine the same, with right of appeal to either party to the Supreme Court of the United States."

When the Court was considering the first Delaware case under the first paragraph quoted, the Cherokees attempted to place several constructions on the agreement considered in this case different from the express language therein contained; and the court in Cherokee Nation *vs.* Journeycake, 155 U. S., 212, makes the following comment:

> "Commenting generally upon this line of argument it is rather an endeavor to induce the Court to reconstruct the contract and frame one more in accord with what, from the present standpoint, would seem to have been equitable, than to interpret the contract which the parties made in accordance with the plain import of the language which they used."

Another point which complainants make in their proof along this line, page 646, is that such proofs were introduced to place the Court as nearly as possible in the position of the contracting parties—that the Court might look at the question from the view point of the Indian at the time the agreement was made.

The same proposition was urged upon the Court in the Journeycake case; and the Court there agreed that it was necessary for them to place themselves back in the circumstances of the parties at the time with their surroundings and their expectations; but stated that it was not necessary

to have any external evidence to do so when the language of the treaty and the contract was sufficiently plain. We take the following from that opinion:

> "In that light we see nothing in the matters suggested by counsel sufficient to overthrow the plain import of the language used in the agreement and must conclude that by such agreement the Delawares became members thereof, and, as such, entitled equally with the native Cherokees to all their rights in the reservation and outlet."

Petitioners argue that there was a fixed ratio as to numbers between the Cherokees and Delawares made by this agreement and that thereby the Cherokees surrendered their right and power to admit other persons to membership in the Cherokee Nation. It is safe to say that the commissioners of both the Cherokees and Delawares would be greatly astounded to know that they had made such an iron-clad agreement which was to be perpetual when the question was not discussed and nowhere appears in the writing agreed to and signed by them.

Every nation has inherently the power to admit new citizens as well as the power to exclude them, in accordance with the terms of its Constitution. And "by treaties with the Cherokees, the United States have recognized them as a distinct political community, so far independent as to justify and require negotiations with them in that character." (Cherokee Trust Fund Case, 117 U. S., p. 285.)

It is an established principle of law that the Legislature will not be held to have surrendered its right and power to legislate on all proper subjects except by words too plain to be misunderstood. It is contended here that the Legislative Branch of the Cherokee Nation has lost its power to admit outside persons to citizenship not by any act of its

own, but by an agreement made by certain commissioners, in which the subject is not mentioned, and over which the commissioners had no power or authority whatever. The Petitioners' argument is based on the statement that by the agreement the benefits of Cherokee citizenship are limited to the actual number of the registered Delawares, and that therefore the Cherokees are also limited to their original number. But as a matter of fact, the benefits are not restricted to the registered Delawares, for all Delawares of every description, registered and native born, within the Cherokee country, are entitled to the same rights and benefits, and if the number of Delawares has been definitely fixed by the agreement, and the number of the Cherokees has not been, the inference would naturally be that no limit was intended as to the Cherokees, because the inclusion of one is necessarily the exclusion of the other.

The petitioners further endeavor to sustain their construction of the agreement between the Cherokees and Delawares by referring to the treaty between the United States and the Delawares, and that between the Cherokees and the United States, both dated in 1866, and insist that these are a part of the agreement between the two tribes of Indians. They seem to have overlooked the fact that the treaty with the Delawares is only mentioned in the agreement between the Cherokees and Delawares so as to exclude it entirely from the agreement. The treaty between the United States and Delawares contemplated a future purchase by the United States of a portion of the Cherokee domain, which the Government was to sell to the Delawares at a fixed price, and the agreement between the Cherokees and Delawares expressly says: "And whereas no such cession of land was ever made by the Cherokees to the United States, but in lieu thereof terms were provided as hereinbefore mentioned, under which friendly Indians might be settled upon their

lands." It is clear, therefore, that in construing this agreement, no light can be thrown upon it by referring to the Deleware Treaty.

The point is raised by the petitioners that the same price was paid for lands which were purchased for aged Delawares as was paid for lands purchased for the younger members, and the inference is drawn that there must have been more than a life estate conveyed. There might be something in this argument if this land had been purchased by individuals, and each had paid from his own funds the price fixed. It is of no force, however, when it is remembered that the lands were paid for from the funds of the Delaware tribe, which belonged in equal proportion to the aged and younger members alike. And further, that when the life estate of the Registered Delaware ended, his interest in the property purchased was not wholly lost, as in the case of an ordinary life estate of an individual, for while the heirs at law of the Registered Delaware did not become the owner of the property occupied by his ancestor, the property did still remain a portion of the National Domain freed from any claim upon the part of any individual, and as such National Domain the heirs of the Registered Delaware was interested in it as one of the members of the Cherokee Nation.

Further it is claimed that the price of $1.00 per acre paid by the Delawares indicated that they purchased more than the right of occupancy during their lives, and reference is made by the petitioners to large tracts of Indian lands sold to the United States for a less sum per acre. It would be most unusual to convert the word "occupancy" in a paper writing into a fee-simple title simply because the price paid for the land in question was larger than had been paid for other lands. Outside of that, however, it is clear that this was not an unreasonable price, when compared with the price paid for other Indian lands, for two reasons: (1) In

the other cases cited, millions of acres of land were conveyed, taking the good with the bad, and how much bad land there was we do not know; (2) in the pending case the Delawares had the right of personal, individual selection, embracing the power to choose the best lands out of millions of acres in tracts varying from 160 to 1,000 acres, and located not in one body, but wherever their interests or judgment dictated, with the right of immediate entry and occupancy, and with the further right that they and their descendants became members of a great tribe of their own people, and interested with them in all the great Domain of the Cherokee Nation.

It is further contended that the Delawares supposed that the treaty of 1866 made by them was in harmony with their previous treaties, and if they make one kind of treaty at one time for the accomplishment of a certain result, they imagine that the same kind of treaty is necessary a second time. It is scarcely necessary to argue this question upon what the Delawares either supposed or imagined.

It is not clear, however, that the Delawares held their lands in Kansas by any better or more extended title than that which they acquired from the Cherokees. Mr. William Adams, a witness for the petitioners, states: "The Delawares had their own lands in Kansas. In the latter part of their stay in Kansas before they moved to the Cherokee Nation, it was their habit for each one to hold his own land." Certainly that does not show a fee-simple title.

It is claimed also that the right of the Delawares is enlarged and extended beyond the words of the Agreement, because of the fact that $1.00 per acre was paid for 160 acres for each person, according to the roll of 985 Delawares, notwithstanding that some had in the meantime died. No proof is made as to the number who died between the date of the Agreement and the actual settlement of the Dela-

wares in the Cherokee country, and presumably it was a very small number, or that the births did not equal or exceed the deaths. Some did die prior to the payment for the land in May, 1869, but that should not affect the question, for the reason that the Delawares had been from 1867 in the occupancy and enjoyment of the land they purchased, and it was only just that they should pay for it.

In addition it may be said that when the Government is dealing with a large number of persons there must be some fixed number upon which calculation shall be based, for deaths may occur at any moment, and it is practically impossible to be making a new register every day, and the agreement having expressly provided for payments upon a basis of 985 Delawares, could not be altered by reason of the changes occurring from natural causes. This is of peculiar force when applied to the Indians, who usually require years to reach an agreement, which could be arranged between white men within a few days.

The claim is made that the Delawares are entitled to a division of the trust funds held by the United States upon a basis excluding all alleged illegally admitted Cherokee citizens, and further, that certain funds alleged to have been misappropriated or stolen from the public treasury of the Cherokee Nation, should be restored, and if this is impracticable, that the decree of the Court should be so framed as not in any way to charge these funds or any portion of them to the Delawares, and that their shares should not be diminished by this defalcation. The Delawares place themselves in an attitude of claiming all the rights of Cherokees, and in fact a great deal more, yet wish to be free from all responsibility growing out of a mismanagement of the funds of the nation to which they belong. The witnesses for the petitioners agree in their statement that the Delawares had participated in

all elections of members of the council and all other officers of the Government, have assumed all rights of citizenship to the fullest extent permitted in the Cherokee Nation, and yet they now decline to bear any of the losses, or to be responsible for any of the failures of the agents whom they have selected. The mere statement of the facts of the case is sufficient to answer the claim set up by the petitioners in this respect. No question is made by the defendant that certain illegal transactions have occurred in connection with the Cherokee national funds, but no member of the nation can assert that he is any less responsible for it than any other. And every member of the nation must bear the same measure of responsibility and the same loss as every other member.

In October, 1897, the Indian Office called upon the law office of the Interior Department "for an opinion as to the quantity of land which the Delaware Indians are entitled to receive per capita in allotment in the Cherokee Nation." At the close of a lengthy and able opinion, after reviewing the former Delaware case decided by this Court and the Supreme Court, the opinion closed with the following extract, which we think states the only conclusion which any fair-minded person can arrive at:

> "In view of these declarations by the Supreme Court as to the meaning and effect of the agreement between these people, the contention that the registered Delawares are entitled to 160 acres each by right of purchase, and also to an allotment in the remaining lands cannot be sustained. As said by the Court of Claims the agreement was something more than a contract for the sale and purchase of lands. It was in fact a compact for the consolidation of two separate and distinct bodies politic by which they become united in one. By its terms the Delawares, or that portion of the tribe which saw fit to accept the agreement, were

merged in and became a part of the body politic of the Cherokee Nation. It was the evident intention and effect of the compact to make the adopted members equal in all respects with the original members.

"After a careful consideration I am of the opinion and so advise you, that the Cherokee citizens of Delaware blood are entitled to the same quantity of land in allotment as are those of Cherokee blood, with the proviso that if it be found that there is not sufficient land to give each member of the Nation 160 acres in allotment, then those Delawares who moved into the Cherokee country known as registered Delawares, shall first be given the full quantity of 160 acres, the remainder of the land to be equally divided among the remaining members of the Nation."

Respectfully submitted,

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